No. 14373

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellant,*

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

B. E. LUTTERMAN,
CHAS. F. HANSON,
MORELL E. SHARP,
Attorneys for Appellee.

609 White Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

No. 14373

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, *Appellant,*

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

B. E. LUTTERMAN,
CHAS. F. HANSON,
MORELL E. SHARP,
Attorneys for Appellee.

609 White Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLES OF CASES

STATUTES

COURT RULES

United States Court of Appeals
For the Ninth Circuit

Northern Pacific Railway Company, a corporation, *Appellant,* vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, *Appellee.*	No. 14373

Appeal from the United States District Court for the Western District of Washington, Southern Division

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The statement of Appellant is so incomplete and inaccurate that Appellee deems it necessary to a proper understanding of the issues to make a more complete statement. At the outset we want to correct a misstatement in the Appellant's brief on which it seems to base its entire argument, to the effect that it seeks to construct the track in question merely for the purpose of serving two industries. This statement is untrue. It is contrary to the express findings of the District Court and all the evidence introduced at the trial, including the appellant's own witnesses, and, as will hereinafter be shown, the purpose for the construction of the track is to invade a territory which is new to the appellant and already adequately served by the Appellee.

The Appellant's assignments of error go only to the findings of fact and conclusions of law of the District Court, and therefore for the convenience of this Court they are herewith set forth in full in proper sequence.

"Findings of Fact

"I.

"This is a suit arising under a law of the United States, to-wit: Part I of the Interstate Commerce Act (Title 49, U.S.C.A., §§1 to 27, inclusive, including National Transportation Policy of September 18, 1940, 54 U.S. Statutes at Large 899).

"II.

"That plaintiff and defendant are common carriers by railroad duly authorized to do, and doing business in the State of Washington in the above-entitled district and elsewhere, in the transportation of persons and property in interstate and intrastate commerce (R. 13), and as such are subject to the provisions of said Part I of the Interstate Commerce Act. That the plaintiff has paid all license fees due the State of Washington.

"III.

"That a portion of plaintiff's line of railroad extends, so far as here material, northerly through Grant County, Washington, to the City of Moses Lake, which city is located in Sections 14, 15, 16, 21, 22, 23, 27, 28 and 33, all in Township 19 North, Range 28 East, Willamette Meridian. That plaintiff is the only railroad serving said City of Moses Lake, and handles a large volume of traffic, interstate and intrastate, both originating at and destined to said Moses Lake and the territory contiguous thereto.

"IV.

"That defendant proposes and has undertaken to construct, and has actually commenced the construction of a track or line of railroad, said track to be connected with defendant's existing line of railroad near defendant's station of Wheeler, in Section 16, Township 19 North, Range 29 East, Willamette Meridian, Grant County, Washington, and thence extending in a westerly direction through Sections 9, 8, 7 and 18 in said Township 19 North, Range 29 East, Willamette Meridian, and into Section 13, Township 19 North, Range 28 East, Willamette Meridian, Grant County, Washington, and terminating at a point approximately on the south boundary of said Section 13, a total distance of approximately four miles. That the said defendant intends (R-14) to construct within Section 13 additional tracks connecting with the aforedescribed track.

"V.

"That the territory sought to be reached by the said proposed track or line of railroad is adjacent and tributary to the trading center of the City of Moses Lake, which City is already being served by the plaintiff's aforesaid railroad and that it is feasible and practicable for said area to be served and occupied by the plaintiff railroad. That there are no industries or loading or unloading facilities now existing adjacent to said proposed track or within said Section 13. That it is the defendant's intention and purpose by the construction of said track or line of railroad, to locate shippers and consignees of freight within said Section 13. That the construction by the defendant of said track or line of railroad would entail the expenditure of a substan-

tial sum of money, and would deprive the plaintiff of substantial revenues.

"VI.

"That the defendant heretofore, on or about May 24, 1948, applied to the Interstate Commerce Commission under the provisions of Section 1(18) of the Interstate Commerce Act for a certificate of public convenience and necessity for the construction of an extension of its line in substantially the same territory as the track or line of railroad described in paragraph IV hereof. That the Interstate Commerce Commission on May 20, 1949, in its Finance Docket No. 16119, issued its decision and order (R. 15) holding that present and future public convenience and necessity were not shown to require the construction and operation of said extension, and denying said application. That there is no substantial or material difference in the defendant's said 1948 proposal and that presented by the present proposal. That the defendant has neither applied for nor received a certificate of public convenience and necessity from said Interstate Commerce Commission for the construction or operation of the track or line of railroad described in said paragraph IV hereof.

"VII.

"That the evidence overwhelmingly establishes that as a matter of fact the said proposed track of the defendant is an extension and not a spur or industrial track within the meaning of the aforedescribed provisions of the Interstate Commerce Act, and that a certificate from the Interstate Commerce Commission certifying the public convenience and necessity is required for the building of such track.

"Conclusions of Law

"From the foregoing facts the Court concludes:

"I.

"That the subject-matter of the action and the parties thereto are within the jurisdiction of this Court.

"II.

"That the proposed track of the defendant described in paragraph IV of the foregoing findings is an extension of the defendant's line of railroad (R. 16) within the meaning of Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)), and cannot lawfully be constructed until the defendant shall first have obtained from the Interstate Commerce Commission a certificate that the present or future convenience and necessity require, or will require, the construction or operation, or construction and operation, of such additional or extended line of railroad.

"III.

"That a judgment and decree should be entered herein in accordance with the prayer of the plaintiff's complaint, making permanent the preliminary injunction entered herein on the eighth day of January, 1954, and permanently enjoining and restraining the defendant from constructing said track described in paragraph IV of the Findings of Fact, unless and until it shall have obtained such certificate of convenience and necessity, and that the plaintiff is entitled to have judgment against the defendant for its costs and disbursements herein.

"IV.

"That the security bond for preliminary injunction filed herein on the eighth day of January,

> 1954, by the plaintiff as principal, and the United Pacific Insurance Company as surety, should be cancelled and the said plaintiff, as principal, and the said United Pacific Insurance Company, as surety, and each of them, should be released and exonerated from all liability arising thereunder." (R. 13-17)

A decree was entered in accordance with these findings and conclusions. No claim is made that these findings do not support the Court's conclusions and decree, and therefore this appeal must fail unless this Court can make an affirmative finding of its own that the findings of the District Court are not supported by any substantial evidence and are clearly erroneous.

Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A., provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

This rule has been consistently applied in this Court.

W. H. Markell & Co. v. Mutual Ben. Life Ins. Co., 62 F.(2d) 193, wherein this Court stated:

> ""A District Court's findings of fact should not be disturbed in the absence of manifest error." (pp. 194-195)

Bolander v. Godsil, 116 F.(2d) 437:

> "In our examination of the evidence, the findings of the Chancellor on conflicting evidence are presumptively correct and will not be set aside unless a serious mistake of fact or law appears." (p. 439)

The Evidence

The area involved in this proceeding is the City of Moses Lake, in Grant County, Washington, and the trading area tributary thereto. The Appellee completed the construction of its branch line extending from its station of Warden on the main line, to Moses Lake, in 1912. The station was first called Neppel, but later was changed to Moses Lake, and was and is the terminus of this branch line (R. 126). The Appellant constructed its so-called Washington Central Branch shortly prior thereto and established its station of Wheeler, which is approximately four miles distant from the City Limits of Moses Lake (Ex. 4). There was very little traffic originating on the Appellee's line at Moses Lake for many years, and the Appellee spent many lean years pioneering this area (R. 87, 164, 165, 95). In 1929 an irrigation district was created in this area which was known as the Moses Lake Irrigation District. This was, and still is, entirely separate from the so-called Columbia Basin Irrigation Project which receives water from the Grand Coulee Dam, and which did not bring any areas into production until the year 1952 (R. 126, 127). The Moses Lake Irrigation District kept expanding until nearly 13,000 acres were included therein. Production from this area kept increasing until by the year 1947, which was six years before any water from the Columbia Basin Project came into the area, production had reached the point where there were over 2,500 carloads of outbound produce originating at the Appellee's station of Moses Lake (R. 126, 127, 128, 165, 166). These outbound shipments have never been equalled or exceeded since that year (R. 165,

166). Plaintiff's exhibits numbered 5 to 9, inclusive, show by years the inbound and outbound shipments over the Appellee's line at its station of Moses Lake and revenues received therefrom. During that period of time the population, industrial and trading area of Moses Lake expanded correspondingly (R. 126, 127). It was at that time that the Appellant first cast its covetous eyes towards the Appellee's station of Moses Lake, and in 1948 it filed an application with the Interstate Commerce Commission (I.C.C. Finance Docket No. 16119), seeking authority to construct a track extending from a point near its station of Wheeler to Section 14, which is partially in and partially outside of the City Limits of Moses Lake. The Interstate Commerce Commission denied this application of the Appellant on the ground that the Appellee was already rendering adequate service to the area, and that the public convenience and necessity did not require the construction of this line. As will be noticed from the Commission's report which was introduced as Exhibit No. 15 (R. 381-403), the evidence introduced by the Appellant in support of that application and its contentions before the Commission were almost identical to its evidence and its contentions in this case. The track which the Appellant was forbidden to build by this order of the Interstate Commerce Commission is shown in red on the map which was introduced as Plaintiff's Exhibit No. 4 (R. 47). In January of this year the Appellant, without Commission authority and in apparent defiance of this previous order of the Commission, actually commenced the construction of a track which would likewise extend from a point on its

branch line near Wheeler, and which would likewise extend in the same general direction towards Moses Lake and terminate in Section 13, which adjoins Section 14, and the city limits of Moses Lake. This track is shown on Exhibit 4 in blue (R. 47). The similarity of the two proposals is also graphically shown by the aerial photograph which is introduced as Plaintiff's Exhibit 10. As found by the Trial Court, "there is no substantial or material difference in this defendant's (Appellant's) said 1948 proposal and that presented by the present proposal" (R. 16). As shown on said Exhibit 4, the take-off point of the track proposed in this proceeding is approximately one mile distant from the take-off for the track proposed in 1948. In each case the proposed track extends across farm lands for a distance of approximately four miles towards the City of Moses Lake. The tracks for the most part parallel each other. The track proposed in 1948 terminated in Section 14. The track proposed in this proceeding terminates in Section 13, which immediately adjoins Section 14. The purpose of the 1948 proposal was to develop and serve an industrial area shown in yellow in Section 14 on said Exhibit 4 (R. 48), which for the most part was situated outside of but adjacent to the corporate limits and trading center of the City of Moses Lake (R. 64, 72, 76). The purpose of the present proposal is to develop and serve an industrial area in adjoining Section 13, which although outside the corporate limits of the City is immediately adjacent thereto and adjacent to the trading and populated area thereof (Ex. 4, R. 55, 73, 75, 76). In each case it would be the intention of the Appellant to serve industries

located in or desiring to locate in the Moses Lake trading and industrial area, it would invade the territory already being adequately served by the Appellee, and deprive it of substatnial revenues. It is significant that the Interstate Commerce Commission in its report stated:

> "If conditions become such that another railroad is necessary no sound reason exists why application can not be made at that time, or without permission from us suitable facilities installed *along* the Connell Northern Branch for shippers who wish to avail themselves of Northern Pacific service." (R. 399) (Emphasis supplied)

Certainly the present proposed site for industrial development in Section 13 is no more "along" the Appellant's branch than the site of its proposed industrial development under its 1948 application. In this connection, it is interesting to note that Mr. Stapleton, Appellant's Western Agricultural Development Agent, testified that following this order of the Commission the Appellant did establish industries "along" its branch line which were being served by what he termed "typical spur tracks" constructed along or near the branch line and within a matter of feet of the branch line (R. 248-250). The estimated cost of Appellant's 1948 proposal, which included all of the industry tracks and terminal facilities shown in the area colored yellow on Exhibt 4, was $215,000.00 (Ex. 3). The estimated cost for the construction of the present track shown in blue on said Exhibit 4 is $205,505.00. This estimate, however, includes only the track shown in blue, which the Appellant's engineer characterized as

a "running track" (R. 330). This same engineer further testified this track could not directly serve industries, but that it was necessary in order to serve industries in Section 13 to construct spur tracks radiating from the running track (R. 61). Exhibit No. 12, which is a drawing prepared by this same engineer, shows tracks radiating from the blue track, which, according to Appellant's engineer, it would be necessary to construct in order to serve the industrial area intended to be created in Section 13. This engineer testified that even the tracks shown in this exhibit would be considered as lead tracks, and that in order to actually serve industries it would be necessary to construct two additional tracks running off each of the tracks shown on Exhibit 12. This amounts to approximately an additional six miles of track. Mr. Derrig, the Appellant's engineer, estimated that the cost of such tracks would be approximately $8.00 a foot, which would mean an additional expenditure of $253,440.00 (R. 321, 322, 323). This makes a total estimated cost of the present proposed development of approximately $458,945.00, or nearly a half million dollars. It is also significant that the Western Freight Traffic Manager of Appellant testified that in addition it would be desirable to install in this same area a team track, or public delivery track, to serve the Moses Lake trading area, and that it was the Appellant's purpose to install such a track when the expense would justify (R. 360-361).

The Appellant has made a point of the fact that its proposed track will be constructed of second-hand rails, ties and fastenings. As a matter of fact, Mr. Derrig, the Appellant's engineer, testified that the rail which it

is intended to be used in his track was heavier than some of the rail in the Washington Central Branch, including the track leading to the station of Schragg in the same vicinity (R. 326, 329). The Appellant has also emphasized that "there will be no passenger, no express or mail service, nor telephone or telegraph service on this proposed track, that the billing and other agency service required in connection with shipments over the trackage will be handled by the agent at Wheeler." Mr. Alsip, the Appellant's General Manager, testified that on its Schragg Branch in the immediate vicinity, the Appellant did not have passenger service, nor express or mail service, or telephone or telegraph service, and that they did not have an agent at Schragg and that the manner in which Appellant proposes to render service on its proposed track is the same as the service performed by the Appellant on its Schragg Branch (R. 363).

As we pointed out in the very beginning of this brief, the Appellant's statement in its brief to the effect that it seeks to build a track "for the purpose of serving two industries which desire to locate there," is untrue and contrary to all of the facts. The entire area which Appellant seeks to serve in Section 13 is presently classified by the United States Bureau of Reclamation, in farm units (R. 58, 59, 66). It is all owned by the Appellant as part of its original land grant (R. 65). There are no industries presently located there, and no industries which have firm purchase or other agreements with the Appellant (R. 77). The actual purpose for the track in question is that of a running track to connect with an additional series of six miles of track

which, according to Appellant's own witness, it would be necessary to construct in order to develop a substantial industrial area in Section 13. Mr. Moore, the Appellant's Western Manager Industrial Properties, testified in effect that if Appellant were permitted to construct the track and develop the industrial area in Section 13 it would be its purpose to solicit the location of all types of industries, including industries such as distributing companies who would distribute in, and would be normally interested in locating near, the trading and population center of Moses Lake (R. 73-76, 342, 343). In his affidavit on file herein, and in his testimony, he also stated that in the event the Appellant is not permitted to construct such tracks, such industries would be lost to it and would in all probability locate in the industrial areas already served by the Appellee railroad (R. 77, 78).

It is true that representatives of the Pacific Fruit & Produce indicated that in the event the Appellant constructed appropriate tracks within Section 13 it might locate a warehouse at that point. However, no firm commitments were in existence (R. 77). As a matter of fact the same Company had been negotiating with representatives of Appellee for a site, and in the event tracks are not constructed within Section 13 it is entirely probable that such industry might locate at some other site where service is already available (R. 97, 140, 141). As the Appellant points out, the primary concern of the representatives of the Pacific Fruit & Produce Company was certain applicable service and rates over the Appellant's line as compared to the Appellee's line (R. 278-279). These are matters going

purely to the question of public convenience and necessity, and do not reach the issue in this case.

A representative of the Interstate Metals Company also testified in effect that he might locate a distribution plant in Section 13 if properly served by trackage; however, again there were no firm commitments (R. 77). This party also had been negotiating with Appellee for an industrial site (R. 333).

It may well be that the interest which these industries have tentatively expressed in locating in Section 13 is motivated by the fact that the entire area has been divided into and designated as farm units by the United States Bureau of Reclamation, and that this land must be sold at the prices fixed by the Bureau for farm units (R. 293).

It is important to note that during the year prior to the trial the Pacific Fruit & Produce had shipped numerous cars of produce over the Appellee's Moses Lake line (R. 266-274), and in the event Appellant were permitted to construct its track Appellee would be immediately deprived of this revenue. Appellant's Western Traffic Manager estimated that the annual railroad revenue from these two industries would be $190,600.00, which, of course, would be a loss to Appellee if the Appellant were permitted to invade the Appellee's territory (R. 356).

The Appellant has mentioned the U. & I. Sugar Company plant, although, as indicated by the Trial Court, this trackage has no materiality to the issue in this case (R. 365-367). Actually, the site of this industry consists of two full sections of land, and is located several

miles from the City of Moses Lake between the branch lines of the Appellee and Appellant.

Mr. Sedgwick, the Appellee's Western Industrial Commissioner, testified that there are substantial industrial sites available which are already or could readily be served by the Appellee, that the Appellee has acquired and is acquiring industrial areas for the purpose of keeping ahead of the demand, and that normally new industries would locate in these presently available industrial areas (R. 139). He testified that Appellee has already developed plans for serving a potential area in Section 14 which immediately adjoins Section 13, and at the request of Appellant's counsel presented a map showing the proposed trackage arrangement for serving this property, which was introduced as Exhibit 14 (R. 152-155, 376-377). He also testified that there is more than sufficient industrial property available to take care of all the foreseeable industrial expansion excluding the farm units in Section 13, and that normally industries would locate in those areas (R. 138, 134, 136). Mr. Crippen, the Appellee's General Manager-Lines West, testified that in the event industries did desire to locate in Section 13 the Appellee could and would construct additional trackage leading from its existing trackage shown on Exhibit 13, to serve the entire area, and that this would be both feasible and practicable, and estimated the cost for track and right of way at $92,500.00 (R. 371). An alternate route and track he estimated could be feasibly constructed for a total cost of $61,000.00 (Plaintiff's Exhibit 13) (R. 370-371).

As has already been noticed, the Appellee has had a long period of pioneering in this area with sparse revenues. Even now the traffic is seasonal and predominently outbound, which according to Mr. Crippen, Appellee's General Manager, still leaves this branch line in the nature of a marginal operation. Mr. Crippen definitely testified that any loss of present revenues, or any jeopardy to future development in the area by the Appellee, would seriously effect the Appellee's ability to continue the operation of this branch line (R. 180, 181). The proposed invasion by the Appellant of this area already adequately served by the Appellee which would have such consequences is one of the things which the law creating the Interstate Commerce Commission and placing certain restrictions upon carriers was designed to prevent.

ARGUMENT

The Appellant specifies as its only errors that the Trial Court erred in making its Findings of Fact V, VI and VII, its Conclusion of Law II, and in failing to find in each case the reverse facts, although no such findings were proposed. The Appellant has at no place in its brief specifically pointed out wherein these findings of the Trial Court are clearly in error, nor has it pointed to any evidence in the case which militates against any of the Court's findings. It has simply made the unsupported argument that the Court should have found to the contrary, and has thus only begged the entire issue on this appeal. As we have clearly demonstrated in our statement of the evidence, all of the Trial Court's findings are supported not only by substantial evidence

but by the overwhelming preponderance of the evidence, including the testimony of the Appellant's own witnesses. Under these circumstances this appeal should be dismissed. *W. H. Markell & Co. v. Mutual Ben. Life Ins. Co.,* 62 F.(2d) 193; *Bolander v. Godsil,* 116 F.(2d) 437, *supra;* and *United States v. Crescent Amusement Co.,* 323 U.S. 173, 65 S.Ct. 254.

Specifications of Error I, II and III

In approaching the legal aspects of this matter it should be understood that the exceptions to the jurisdiction of the Interstate Commerce Commission set forth in Section 1(22) of the Interstate Commerce Act, must be narrowly and strictly construed, and that the burden of proof lies with the party seeking to come within such exceptions. *Piedmont Northern Railway Co. v. Interstate Commerce Commission,* 286 U.S. 299, 52 S.Ct. 541 (pp. 311-312):

> "The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

Lancaster v. Gulf C. & S. F. Ry. Co., 298 Fed. 488:

> "If, as I believe to be the case, paragraph 18 is the controlling portion of the act, and the purpose there expressed to make the public good, rather than the competitive instinct of railroad companies, the determining factor in the matter of whether substantial capital additions to existing railroads and substantial capital outlay in launching new roads shall be incurred, then in any case of complaint against the proposed addition to the capital account of a railroad company for the construction

> or extension of a line of road, which construction or extension is not sanctioned by a certificate of the Commission, *an injunction ought to issue unless the constructor can satisfy the court that the construction is clearly within the exception to or limitation upon the statute, and is a side track, spur track, switch track, or industrial track, as contemplated and provided for in paragraph 22 of the act.*" (Emphasis supplied.)

As the Appellant has recognized, the leading case discussing the distinction between an "extension" as used in Section 1(18) of the Interstate Commerce Act, and the term "spur" or "industrial track," which is exempt from the Interstate Commerce Commission's jurisdiction under Section 1(22) of the Act, is *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.,* 270 U.S. 266, 276-279, 70 L.ed. 578. This suit was brought by Lancaster, *et al.,* then receivers of the Texas & Pacific, in the United States District Court for the Southern District of Texas to enjoin the Gulf, C. & S. F. Railway Company, called the "Santa Fe," from constructiong projected trackage lying wholly within the State of Texas. The defendant there, as in the case at bar, contended that the line was merely an industrial track, and exempt under the provisions of Section 1(22) of the Interstate Commerce Act. The District Court (298 Fed. 488) held for the plaintiff. On appeal, the Court of Appeals for the Fifth Circuit, in 4 F.(2d) 904, reversed the decree of the District Court. Thereupon, the Texas & Pacific appealed to the United States Supreme Court. In that case, the airline distance from the defendant's line to its proposed terminus was 3¼ miles, but due in part to topographical conditions, the actual length of the

proposed line was 7½ miles. The cost of construction was estimated at $510,000.00. In discussing the facts, the Supreme Court pointed out that in some respects the character of the proposed construction was that commonly used for industrial tracks, that no industry was then located along the proposed line, and that no plant then served by the plaintiff, Texas & Pacific, lay directly on the proposed line. The Court reviewed the following contentions of the defendant:

> "The Santa Fe contends that it constitutes an industrial track within the meaning of paragraph 22, because the line is to be constructed solely for industrial purposes. It shows that, according to the plans, the general public is not to be served; that, except at Hale, there will be no public station for the receipt or delivery of freight; no telegraph service; no express, mail, or passenger traffic; that the transportation between Hale and the industries will be confined to carload freight; that it will be conducted as a switching service for which no charge will be made; and that the Hale rate will apply to all traffic on the projected line. It argues that a branch is a line serving one or more stations beyond the point of junction with the main line or another branch, and to or from which stations regular tariff rates are in effect; that an industrial track is a line constructed to serve or reach industries over which regular scheduled passengers or freight train service is not performed and for transportation over which only a switching charge, if any, is made; and that neither the length of the line, nor the character of the construction, can convert into a branch a line of the nature described." (270 U.S. 276-277)

It will be noted that the contentions of the Santa Fe in

this respect were almost identical with those advanced by the Appellant herein. The Court pointed out that the true guide to the meaning of the terms "extension" and "industrial track" as used in paragraphs (18) to (22) is furnished by the context and by the relationship of the specific provisions of those paragraphs to the railroad policy introduced by the Transportation Act, 1920, by which measure Congress undertook to develop and maintain for the people of the United States an adequate railway system. The Act recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern, that the building of unnecessary lines involves a waste of resources, that the burden of this waste may fall upon the public, and that competition between carriers may result in harm to the public as well as in benefit, and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. After the above discussion, Mr. Justice Brandeis, speaking for the Court, said:

> "When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the

carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. *But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier,* its purpose and effect are, under the new policy of Congress, of national concern." (270 U.S. 277-278) (Emphasis supplied.)

The conclusion of the Court was as follows:

"If the purpose and effect of the new trackage is to extend substantially the line of a carrier *into new territory,* the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short, *and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal Commission issues its certificate that public convenience and necessity require its construction. The Hale-Cement Line is clearly an extension within this rule." (270 U.S. 278-279) (Emphasis supplied.)

Under the specific tests laid down in this decision, if a contemplated track extends into a territory not theretofore served by the carrier proposing the construction, or where such track would extend into territory already served by another carrier, such track is an extension and not an industry or spur track within the exemption. While the Appellant has recognized these to be conclusive tests, the burden of its argument is to

the effect that its proposed track would not serve a territory which is new to it nor invade territory already served by the Appellee. The difficulty with the Appellant's argument is that the Trial Court specifically found that the Appellant's proposed track would extend to a new territory which the Appellant does not now serve, and would invade a territory which is already being adequately served by the Appellee. These findings are supported by the testimony of the Appellant's own Western Manager Industrial Property and Western Traffic Manager, who in effect admitted that the purpose of the proposed extension was to serve industries in the Moses Lake trading area, which industries would otherwise normally be served by the Appellee. The findings are also supported by the testimony of the Appellee's Western Industrial Commissioner and General Manager, which has been discussed under our statement of the case. The maps and other physical evidence also clearly support the Court's findings and conclusions in this respect. In fact, there is no evidence to the contrary.

The District Court in its very able opinion, which for the convenience of this Court is set forth in full as Appendix "A" hereto, after carefully analyzing all of the decided cases upon this question, and after pointing out the various factors considered by all of the courts, stated:

> "If each of the questions above stated be answered in the light of the evidence in the present case, and the Court has considered the matter in exactly that way, in every instance the answer will indicate that the proposed track here in question

is an extension rather than a spur or industrial track. Except for the absence of a station, independent billing and similar circumstances the Court does not find a single factor in the case supporting a determination that the proposed track is a spur. Irrespective of where the burden of proof lies in a case of this character, the evidence overwhelmingly establishes that as a matter of fact the proposed line is an extension and not a spur or industrial track. Accordingly, a Certificate of the Interstate Commerce Commission certifying public convenience and necessity is required for the building of such a line. It being admitted that none has been issued, the defendant must be permanently enjoined from building the proposed track unless and until a Certificate be issued.

"Decree to such effect may issue." (R. 28-31)

This court in the case of *Southern Pac. Co. v. Western Pacific California R. Co.,* 61 F.(2d) 732, 736 (U.S. Court of Appeals, Ninth Circuit), also considered the matter. That case involved a suit by the Western Pacific against the Southern Pacific for an injunction against the construction of 10,000 feet of new trackage into new and undeveloped territory. The District Court entered a final decree permanently enjoining the Southern Pacific from constructing, maintaining or operating a partly-completed railroad track upon any territory in San Mateo County, California, lying east of the location of the Western Pacific's proposed railroad, between said proposed railroad and San Francisco Bay. The Western Pacific had theretofore applied for and obtained a certificate of public convenience and necessity for the construction and operation of this proposed line.

On a former appeal, the Court of Appeals held that the Western Pacific was not a "party in interest" under Section 1(20) of the Interstate Commerce Act, and reversed the trial court without opinion with respect to the merits. The United States Supreme Court reversed the Court of Appeals and remanded the cause to that court for determination of the questions of fact involved (284 U.S. 47). The facts were that after the issuance of the certificate to the Western Pacific, the Southern Pacific, without having applied for a certificate, began the construction of a track 10,000 feet in length, directly across the location and route of the Western Pacific's proposed railroad to a 500-acre tract which was new territory not theretofore served by the Southern Pacific and on the other side of the Western Pacific's authorized proposed line. This Court quoted with approval from *Texas & Pacific Railway Co. v. Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266, 277, 278, and held that under the tests therein set forth, the track was not an industrial spur but an extension, and that since it was an extension, a certificate of convenience and necessity from the Interstate Commerce Commission was required. The Court stated (pp. 735-736):

> "Nor does the mere fact that the industrial agent of the appellant 'came to the conclusion * * * that about the only way we could get industries started in San Mateo was to put a switch track down there,' or that certain civic interests in San Mateo wanted such a spur track built, serve to deprive the Interstate Commerce Commission of the United States of the opportunity of passing up the necessity and desirability of new construction across 'cow pasture,' in the language of W. H. Kirkbride, the

appellant's own engineer of maintenance of way and structures of its Pacific System."

* * *

"Our decision does not prejudice the appellant's right to proceed with this construction, should the proper agency for the determination of the question —namely, the commission—find that the proposed track is in fact required by 'the present or future public convenience and necessity.' We simply are not prepared, under the facts and the law of this case, to deprive the commission of the opportunity of passing upon the existence of a state of facts, the determination of which is one of its statutory duties.

"Accordingly, the decree is affirmed."

One of the most recent cases on the subject is *Union Pacific R. Co. v. Denver & Rio Grande Western R. Co.,* 198 F.(2d) 854. In this case it appeared that an industrial area in Salt Lake City lying between the tracks of the Rio Grande and the Union Pacific was expanding. The Rio Grande had been serving industries in that general area for a number of years, and could easily serve additional industries by construction of additional industry tracks. The Union Pacific was on the opposite side of the area, but could easily build a lead track into the area at a cost of $62,000.00. The Court held that the track proposed to be built by the Union Pacific was not an industrial spur but an extension of its line of railroad, requiring a certificate from the Interstate Commerce Commission. The Court, after discussing the issues in light of the decision of the United States Supreme Court in *Texas & Pacific Ry. Co. v. Gulf,*

Colorado & Santa Fe Railway Co., 270 U.S. 266, *supra,* concluded as follows:

> "Here, the heart of the industrial area lies between Second and Fourth West Street. Rio Grande is serving industries within the area by means of spur tracks extending from its main line and from its interchange track. And that company is in position to serve adequately by like means other industries which may come into the area as further development occurs. But industries between Second and Fourth West Streets are not presently reached and served by Union Pacific. It does not have spurs extending from its main line across Second West Street and thence into the area. And it does not reach industries within the area by other trackage. So far as that company is concerned, the proposed trackage will invade new territory not previously or presently served by it; and it will result in loss of revenue to a competing line which is furnishing adequate service to industries already in the area and is prepared to supply like facilities to other industries which may come into the area in the future. The proposed track is an extension, within the meaning of paragraph (18); and its construction is forbidden unless and until a certificate of convenience and necessity has been obtained. *Texas & Pacific Railway Co. v. Gulf, Colorado & Santa Fe Railway Co., supra;* and see *Missouri Pacific Railroad Co. v. Chicago, Rock Island & Pacific Railroad Co.,* 8 Cir., 41 F.2d 188, certiorari denied 282 U.S. 866, 51 S.Ct. 74, 75 L.Ed. 765; *Missouri Pacific Railroad Co. v. St. Louis Southwestern Railway Co.,* 8 Cir., 73 F.2d 21." (198 F.2d 859)

The facts in the comparatively few cases which the

Appellant has cited in which a court has held that a particular track was not an extension but rather an industry or spur track in the meaning of the exemption, are clearly distinguishable from the facts in the case at bar. For instance, in *Chicago, M. St. P. & P. R. R. Co. v. Chicago & E. I. R. Co.,* 198 F.(2d) 8, the Court emphasized that the new track was for the purpose of serving one industry in an area entirely divorced from a community or populated center, and in an area where the only other industry was already served by the defendant railroad.

The case of State of *Idaho v. United States,* 10 F. Supp. 712, affirmed 298 U.S. 105, was an action to set aside and vacate an order of the Interstate Commerce Commission granting a certificate to abandon nine miles of railroad located within the State of Idaho. In that case the line sought to be abandoned was serving but one industry, and there was no controversy as to the invasion of territory. The lower court noted a number of factors which, while not present in the State of Idaho case, are present in the instant matter, thus:

> "The decisions of the Federal Court seem to turn on several factors, no one of which is controlling. Extensions that invade competitive territory and private business with another carrier, that serve more than one industry, a small community, or which are used by the public generally, short pieces of track connecting two different railroads, so as to afford through lines, or joint use of tracks, or any piece of track serving a large industry or small community, the expense of operating which is so large as to be an undue burden on, or affect the ability of the carrier to perform its duty as an

> interstate carrier or lines into new territory, are factors, one or more of which are present in the cases held to require a certificate from the Interstate Commerce."

In affirming the District Court decision, the U. S. Supreme Court, 298 U. S. 105, again by Justice Brandeis, stated:

> "The District Court concluded that the Talbot branch was constructed and has been maintained for the purpose of serving a single industry; that practically no other industry is served; that this trackage does not invade new territory; that its continued operation or abandonment is of local and not of national concern; that it is therefore a 'spur'."

The case of *Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co.,* 172 F.(2d) 768, is likewise not in point. In this case each of the two railroads involved in the action was already serving the industrial district of the City of Houston. Each of the two companies had commenced the construction of tracks to serve a tract of land which was adjacent and equally accessible to both of them in this general industrial area. The cost of the defendant's construction was estimated at between $30,000.00 and $40,000.00. The Court's decision hinged upon the fact that the territory sought to be served was equally accessible to and equally within the territory already served by each of the parties, and therefore neither party was invading territory of the other.

In its argument under these specifications the Appellant has also cited the case of *Great Northern Ry. Co. Abandonment,* 247 ICC 407. This abandonment case is not in any way similar on its facts to the case at bar.

It would be difficult to find a decision of the Interstate Commerce Commission closer on the facts than the decision denying Appellant's own application in 1948 for authority to build a track which substantially parallels the track in question, which report and an order of the Commission was introduced as Plaintiff's Exhibit No. 15 (R. 382-403 incl.). As the Trial Court found, there is no substantial difference between the Appellant's 1948 proposal and its present proposal, and this decision of the Commission should therefore be conclusive. However, for the Court's benefit we wish to point out the following decisions of the Commission which are typical of the numerous other cases in which it has taken jurisdiction, and necessarily held that a certificate of public convenience and necessity was required for the construction of even short pieces of track to serve industrial areas:

Chicago, R. I. & G. Ry. Co., Trustees Construction, 207 ICC 751. A four-mile piece of track extending from applicant's existing branch line to serve present and future oil field industries located in the territory tributary to the applicant's existing line. Estimated cost $26,000.00.

Oregon, Pac. & E. Ry. Co., Construction, 212 ICC 360. Three miles of track extending from applicant's existing branch line to a proposed mill and townsite. Estimated cost $23,351.50.

California, A. & S. F. Ry. Co., Construction, 224 ICC 432. Track 5.9 miles, extending from applicant's main line to service proposed warehouses for fruits and produce. Estimated cost $93,000.00.

Under this specification of error the Appellant has again referred to trackage serving the U. & I. Sugar Company, although the Court specifically ruled that the status of such tracks had no materiality to the issues in this case and no error has been specified for such ruling. The argument should, therefore, be entirely ignored. The Appellant has indicated that it would have been possible to have connected its proposed track with its track serving this industry. There is no evidence in the case that this would either be feasible from a physical point of view or from a railroad operating point of view. As a matter of fact, a casual reference to Appellant's exhibits showing this trackage would clearly indicate that it is not practical from an operating point of view to make such an extension. In any event, any argument that a railroad by the simple device of connecting an extension of its line to an existing spur rather than by making a direct connection could avoid the necessity of applying to the Interstate Commerce Commission for a certificate of convenience and necessity is, if not absurd, certainly naive.

The Appellant has asked the questions on page 25 of its brief, "If, for operating or other reasons, the railroad prefers to spring a new track rather than extend the sugar spur, is the character of the new track changed?" The obvious answer to this question is that the character of a track is never determined from the maner of its connection. The further answer is, of course, that a proposed track which is an extension of a line does not change its character to that of a spur or industry track by connecting it with an existing spur or industry track instead of to the main line. If Appel-

lant's argument were sound, any carrier could construct unlimited extensions of its line by the simple device of connecting the new track to an existing industry track rather than to the main line. The circumvention of a regulatory law by such a naive device has never been tolerated. The Appellant has also made some argument on page 23 of its brief that public interest requires the construction of its proposed track. This certainly is not an issue in this case and is the very matter which the Interstate Commerce Commission is required to pass upon before granting a certificate of public convenience and necessity for the construction of such a track.

Specification of Error IV

Under this Specification of Error Appellant argues that the District Court erred in finding that the proposed construction would involve a substantial sum of money, since only the sum of $205,505.00 is involved. In fact, as pointed out in our statement of the case, Mr. Derrig, the Assistant Chief Engineer of the Appellant, testified that this included only a running track, and that in order to serve industries and fully develop Section 13 it would be necessary to build additional tracks as shown on Exhibit 12 which, under his own estimate, would involve an additional expenditure of $253,440.00, or a total of almost a half million dollars, which is no insubstantial sum. The estimated cost of the Appellant's 1948 proposal, which included not only the running track but the terminal tracks and terminal facilities, was the sum of $215,000.00. Under all of the decisions the cost of construction is not the determining factor. In fact, there are many cases in which the cost

was substantially less than the Appellant's estimated cost and yet the track was held to be an extension. The expenditure involved by the Union Pacific in the case of *Union Pac. R. Co. v. Denver & Rio Grande Western R. Co.,* 198 F.(2d) 854, *supra,* which is the most recent case on the matter, was only $62,000.00. As previously pointed out, track construction which the Interstate Commerce Commission has held to be an extension involved expenditures as little as $26,000.00 in the case of *Chicago, R. I. & G. Ry. Co., Trustees, Construction,* 207 ICC 751, supra; $23,351.50 in the case of *Oregon Pac. & E. Ry. Co., Construction,* 212 ICC 360; and $93,000.00 in *California A. & S. F. Ry. Co., Construction,* 224 ICC 432.

The Appellant also argues under this specification that the proposed track would not deprive the Appellee of revenue. It was shown that one industry which might locate on the Appellant's track had in the year prior shipped numerous cars of freight over the Appellee's line, and the Appellant's own estimate of annual revenues to be received from this industry was $190,-600.00, which would be a loss to Appellee if the Appellant were permitted to invade the Appellee's territory. In addition, Mr. Moore, Appellant's Western Manager Industrial Properties, admitted that in the event the Appellant were permitted to construct this track it would seek to locate and serve any industry desiring to locate in the Moses Lake area and which would otherwise be served by Appellee. As we have also pointed out, any loss of revenue or other jeopardy to this branch line of the Appellee might seriously affect the Appellee's ability to continue operation thereof because of

its marginal nature. Whether under such circumstances Appellant should be permitted to invade the Appellee's territory is clearly a question solely within the jurisdiction of the Interstate Commerce Commission.

Specification of Error V

Under this specification the Appellant attacks the finding of the Court to the effect that the construction of the proposed track of Appellant is in the same or substantially the same territory as that sought to be served by Appellant, by virtue of its application to the Interstate Commerce Commission in 1948. Plaintiff's Exhibit No. 4, which shows the Appellant's proposed track in 1948 in red and the present proposed track in blue, clearly demonstrates the similarity of the two proposals. Both proposed lines take off of the Appellant's branch line at approximately the same point, and extend across farm lands towards the City of Moses Lake for a distance of approximately four miles. Along most of the line the routes parallel each other, and at one point they are less than one-fourth mile from each other. The track proposed in 1948 terminated in Section 14, which for the most part was outside of, but adjacent to, the City of Moses Lake. Its purpose was to serve an industrial area in the Moses Lake trading area, which is shown colored in yellow on Exhibit 4. The present proposed track terminates in Section 13, which actually adjoins Section 14, and also immediately adjoins the City of Moses Lake. Its admitted purpose is to serve industries located in or desiring to locate in the trading area of Moses Lake. In each case the adverse effect of the new track upon the Appellee would have

been the same. Certainly these facts conclusively support the Court's finding, and there are no facts which establish that the Court's findings are clearly erroneous. The Appellant has pointed to the language of the Commission in its order to the effect that Appellant could locate industries "along" its branch line and that the denial of the application for authority to serve the Moses Lake territory was "without prejudice to the applicant to renew the same at some future date if and when it appears that the existing railroad facilities are inadequate to meet the then public convenience and necessity" (R. 402). Even a casual glance at the map which was introduced as plaintiff's Exhibit 4 conclusively demonstrates that the facilities which the Appellant intends to develop under its present proposal are no more "along" its Connell Northern branch than the facilities which it proposed to install under its 1948 proposal.

It is a matter of public record that the Appellant has since the decree entered by the District Court in this case, filed its application with the Interstate Commerce Commission (I.C.C. Finance Docket No. 18544) asking for a certificate of public convenience and necessity permitting the construction of the track in question, together with short additional trackage connecting therewith. Certainly, under all these circumstances, the following expression of this Court in the case of *Southern Pac. Co. v. Western Pac. California R. Co.,* 61 F.(2d) 732, *supra,* is most apt:

> "We simply are not prepared, under the facts and the law of this case, to deprive the Commission of the opportunity of passing upon the existence of

a state of facts, the determination of which is one of its statutory duties."

CONCLUSION

It is respectfully submitted that the findings of fact of the District Court are not only supported by substantial evidence, but as the Trial Court has pointed out in its memorandum decision by the overwhelming evidence (R. 31) that these findings support the conclusions and decree of the District Court, and that the decree should therefore be affirmed.

Respectfully submitted,

B. E. Lutterman
Chas. F. Hanson
Morell E. Sharp
Attorneys for Appellee.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Wisconsin corporation, *Plaintiff*, v. NORTHERN PACIFIC RAILROAD COMPANY, a Wisconsin corporation, *Defendant*.	No. 1761

DECISION

Plaintiff Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereafter the "Milwaukee") pursuant to 49 U.S.C. 1(2) seeks to enjoin defendant Northern Pacific Railroad Company (hereafter the "Northern Pacific") from constructing approximately three miles of tracks with sidings and other subsidiary tracks. The proposed line would extend from a principal branch of the Northern Pacific to a 400-acre tract in the outskirts of the town of Moses Lake, Washington, which land, presently without industry, the Northern Pacific owns and proposes to develop into an industrial tract.

During the past ten years, because of extensive irrigation development from the Grand Coulee Dam, Moses Lake has been growing at a rapid rate. The town is centrally located in a vast area that eventually will be one of the great agricultural areas of the world. Moses Lake and its immediate vicinity has been served by the Milwaukee for many years by a branch line running into the town. From time to time as necessity demanded,

additions to the Milwaukee's branch have been made and further additions to the branch for serving the area of the proposed Northern Pacific industrial tract are entirely feasible; in fact, the area already has been surveyed and Milwaukee engineers have drawn alternative plans for such project.

The Northern Pacific proposed industrial tract is located in an agricultural area in which no industries are presently located; however, at least two firms have made commitments to locate therein if the proposed line is built. Industrial sites are available on the existing Milwaukee branch line in Moses Lake and vicinity.

The Northern Pacific estimates the cost of the proposed construction at approximately $205,000; the Milwaukee estimate is considerably higher.

The terminus of the proposed construction would be about one mile from the end of the Milwaukee Moses Lake branch line and less than one-half mile from the city limits of Moses Lake. Under the plans for the proposed line there would be no separate station or agent for the line, no regularly scheduled trains or passenger service thereon, rates would be as for the station of Wheeler on the Northern Pacific principal branch line and the Wheeler agent would provide billing and other services.

The law pertaining to a controversy of this kind is well settled by the decisions cited in the trial briefs. *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.,* 270 U.S. 266, 70. L.ed. 578 (1926); *Marion & Eastern R. R. Co. v. Missouri Pacific R. R. Co.,* 318 Ill. 436, 149 N.E. 492 (1925); *Missouri Pac. R. Co. v.*

Chicago, Rock Island & Pacific Ry. Co., 41 F.2d 193, *cert. den.* 282 U.S. 866 (8 Cir. 1930); *Southern Pac. Co. v. Western Pacific California R. Co.,* 61 F.2d 732 (9 Cir. 1932); *Missouri Pacific R. Co. v. St. Louis Southwestern Ry. Co.,* 73 F.2d 21 (8th Cir. 1934); *Union Pacific R. Co. v. Denver & Rio Grande Western R. Co.,* 198 F.2d 854) (10 Cir. 1952). In the foregoing cases proposed tracks were held to be "extensions"; "spurs" or "industrial" tracks were found in the following: *State of Idaho v. United States,* 10 Fed. Sup. 712, aff. 298 U.S. 105, 80 L.Ed. 1070 (1936); *Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co.,* 172 F.2d 768 (5 Cir. 1949); *Chicago, Milwaukee, St. Paul & Pacific R. R. Co. v. Chicago & Eastern Illinois R. Co.,* 198 F.2d 8 (7 Cir. 1952); *Jefferson County v. Louisville & N. R. Co.,* 246 S.W. 2d 611 (Ky. 1952). In none of the cited cases are the facts exactly apposite to those in the present case, but under the decisions referred to there is no question as to the general principles applicable.

A detailed discussion of each of the cited cases would not serve any useful purpose. Suffice it to say that it is believed the decision made herein is not out of harmony with any of the cases cited by either party. The case closest to the defendant's situation is *Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co.,* supra, but even that case has very important factual features that distinguish it from the present case.

Under the Interstate Commerce Act, 49 U.S.C. 1 et seq., a railroad desiring to build new track constituting an extension of its line must have an I.C.C. Certificate of Public Convenience and Necessity authorizing the

construction (Section 1(18)), and the building of proposed extension tracks without a Certificate must be enjoined on an appropriate application therefor (Section 1(20)). The jurisdiction of the I.C.C., however, does not apply to the laying of tracks which are merely for spur or industrial services (Section 1(22)).

It appears to be well settled that the Court must give a liberal or broad construction to the word "extension" and a limited or narrow construction to the words "spur" and "industrial" as applied in the Transportation Act to proposed railroad tracks. *Lancaster v. Gulf C. & S. F. Ry. Co.,* 298 Fed. 488 at 490; *Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co.,* 270 U.S. 266; *Piedmont & Northern Railway Co. v. Interstate Commerce Commission,* 286 U.S. 299 at 311; *Interstate Commerce Commission v. Piedmont & Northern Railway Co.,* 51 F.2d 766 at 774.

Under the statutes, this Court has no concern with and no right to consider whether public convenience and necessity require or would be furthered by the proposed track and any factors bearing on convenience or necessity of the public are irrelevant to the ultimate question that must be determined in this case. Neither the making of an application by defendant in 1948 for a Certificate authorizing construction of proposed track in the same general area nor the action of the Interstate Commerce Commission in denying that application has any bearing on whether the presently proposed track is an extension or a spur; however, the fact is that there is no substantial or material difference in the essential elements of the situation presented by the 1948 appli-

cation and that presented by the track laying proposal now under consideration. The two proposals in all material respects are identical. Inasmuch as the Interstate Commerce Commission, with exclusive jurisdiction to consider and determine public convenience and necessity, held that the track proposed by defendant in 1948 was not authorized on such grounds, there would be all the more reason for this Court not to permit any consideration of public convenience or necessity to justify the building of the presently proposed track as a spur or industrial line.

The question for determination in this proceeding is very narrow and limited. Basically it is: whether or not the track that the Northern Pacific proposes to build is an extension into territory new to that railroad and invading a field properly within or immediately adjacent to the area presently served by the Milwaukee. In dealing with similar controversies the Courts have considered a variety of principal factors, not any one of which has been held controlling in any given case. Among these factors are those indicated by the following questions:

Is the proposed track to improve rail facilities required by shippers who are already being served?

Is the proposed track to provide service to new shippers situated similarly to old ones and who are likewise entitled to service?

Will the track extend into "virgin territory"?

Is the territory to be served by the proposed track within or adjacent to a general area or community already being adequately served by another carrier?

Is it feasible or practicable for the entire area to be served and occupied by the carrier already serving the area?

Will the proposed track necessitate a substantial capital outlay?

These may not be all of the specifi questions that have been posed in similar cases, but certainly they are the principal ones. As may be noted, the questions have been framed for the most part in the specific language of the decisions previously cited.

A further matter discussed in the cases relates to the presence or absence in connection with the proposed new track of stations, agents, line haul rates, billing by existing facilities, regular and continuous movement of trains and other similar circumstances. The authorities indicate that the presence of these conditions would be indicative of an extension, but the absence thereof does not necessarily establish the existence of a spur or industrial track.

If each of the questions above stated be answered in the light of the evidence in the present case, and the Court has considered the matter in exactly that way, in every instance the answer will indicate that the proposed track here in question is an extension rather than a spur or industrial track. Except for the absence of a station, independent billing and similar circumstances the Court does not find a single factor in the case supporting a determination that the proposed track is a spur. Irrespective of where the burden of proof lies in a case of this character, the evidence overwhelmingly establishes that as a matter of fact the proposed line is

an extension and not a spur or industrial track. Accordingly, a Certificate of the Interstate Commerce Commission certifying public convenience and necessity is required for the building of such a line. It being admitted that none has been issued, the defendant must be permanently enjoined from building the proposed track unless and until a Certificate be issued.

Decree to such effect may issue.

Dated at Tacoma, Washington, this 25th day of February, 1954.

GEORGE H. BOLDT
United States District Judge